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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 03 008 51544 Office: VERMONT SERVICE CENTER Date: JUL 18 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel expresses concern that the director denied the petition, pending for two years, without issuing a request for additional evidence. We will consider the new evidence submitted on appeal. We note, however, that, according to the regulation at 8 C.F.R. § 103.2(b)(12), evidence submitted in response to a request for additional evidence must relate to the alien's eligibility *as of the date of filing. See also Matter of Katigbak;* 14 I&N Dec. 45, 49 (Comm. 1971). The evidence of the petitioner's achievements after that date, including her manuscripts published after that date, cannot be considered evidence of the petitioner's eligibility as of the date of filing. If the petitioner believes that this evidence demonstrates her eligibility, it should form the basis of a new petition with a new priority date.

For the reasons discussed below, we find that the director erred in concluding that the proposed benefits of the petitioner's work would not be national in scope; however, we uphold the director's remaining basis of denial. The petitioner's record as a researcher as of the date of filing did not warrant a waiver of the labor certification process in the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Medical Degree from Shahid Beheshti University in Tehran. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, medical research. The director concluded, with little discussion, that the proposed benefits of the petitioner's work, improved understanding and treatment of Polycistic Ovary Syndrome (PCOS), would not be national in scope. This prong looks at the proposed benefits of the petitioner's work, not her personal qualifications. We find that improved understanding and treatment of PCOS would be national in scope.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Unlike the previous two prongs, however, our analysis now turns to the alien's own qualifications rather than with the position sought. The director concluded that the petition was initially supported by letters from the petitioner's immediate circle of colleagues

who discussed the importance of the petitioner's area of research more than her past achievements. The director also noted the lack of objective evidence of the petitioner's influence in the field, such as frequent citation.

On appeal, counsel asserts that the director erroneously discounted the distinguished reputation of the petitioner's employer, Yale University, and the institution funding the petitioner's work. Counsel notes that this office has accepted the significance of team medals. Counsel's analogy is not persuasive. A team medal is a medal won by an entire team; every member receives recognition. Acknowledgement of that fact does not logically lead to the conclusion that every researcher for Yale deserves credit for every accomplishment of that university. In fact, counsel concedes that employment for Yale does not create a presumption of eligibility. We will credit the petitioner for joint research projects on which she participates and is listed as a coauthor in the resulting published results. We note, however, that any research, in order to be accepted for funding, must offer new and useful information to the pool of knowledge. Yet this office repeatedly refuses to find that working with a government grant inherently in and of itself serves the national interest to an extent that justifies a waiver of the job offer requirement.

Counsel further asserts that the labor certification process would hurt Yale University, as it would be forced to hire minimally qualified researchers. Yet, counsel then states that he is not asserting that "biomedical researchers should be exempted from testing the U.S. labor market." Counsel concludes:

> We agree that in most instances, the core value of the law should be to establish the availability (or unavailability of fully qualified U.S. applicants for a given position. However, the Congress has specifically identified that individuals such as [the petitioner] who are contributing substantially to U.S. national interests should be exempted from testing of the US. Labor market, presumably because such individuals have essentially been pre-certified as in short supply. [Citizenship and Immigration Services (CIS)] does not have the right to override Congressional directive as appearing in the statute if the alien has carried his/her burden of showing that his/her contributions and services will benefit U.S. national interests.

Counsel provides no reference to legislative history or the language of the statute itself that supports his pre-certification analysis. As stated above, Congress did not define the phrase "in the national interest." Our standard for evaluating waiver requests is set forth in *Matter of New York State Dep't of Transp.* 22 I&N Dec. at 215, discussed above. That decision provides the following principles that bind us. First, it is the position of CIS to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *Id.* at 217. Second, while the inapplicability of the labor certification process will be given due consideration in appropriate cases, it cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5. Finally, special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221.

As stated by the director, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. *A petitioner must demonstrate a past*

history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. Moreover, this track record must be apparent at the time of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak;* 14 I&N Dec. at 49.

At the time of filing, the petitioner had been working for Dr. [redacted] at Yale University for one and a half years. The petitioner had presented her work at the Reproductive Endocrinology Journal Club in Dr. [redacted] home, an article accepted for publication in *Endocrinology,* an article in press for the *American Journal of ObGyn,* and an abstract accepted for a poster presentation. Thus, none of her work had been disseminated beyond Yale University at that time.

Dr. [redacted] asserts that the petitioner plays a key role in Dr [redacted] laboratory, "probably the most advanced laboratory," which "has received major funding from the federal government/National Institutes of Health (NIH) in direct recognition of the importance of our work and its relevance to national concerns." Specifically, the petitioner "has developed highly sophisticated procedures of immense scientific importance to extract and isolate ovarian theca cells from ovarian specimens which then enables her to extract DNA and test the scientific underpinnings of apoptosis (i.e. programmed cell death). Using Yale's "unique system of separating theca cells from granulose and other cells," the petitioner "developed and tested several techniques to assess apoptosis of theca cells." Dr. [redacted] affirms that these techniques "are extremely technically demanding and require high expertise," concluding that the petitioner "is the only person capable of carrying these experiments."

Dr. [redacted] asserts that the American Society for Reproductive Medicine has "reviewed and critiqued" the petitioner's work "for its importance in advanced studies of various ovarian conditions." Dr. [redacted] only elaboration of this claim is to assert that the petitioner's techniques for extracting and isolating theca cells "was recently accepted for a presentation at the forth-coming meeting of the widely acclaimed American Society for Reproductive Medicine." The record reflects that this work was accepted as a poster presentation to appear at a conference after the date of filing. The record does not establish the significance of poster presentations in relation to oral presentations. For example, the record lacks evidence regarding the percentages of acceptance for poster presentations versus oral presentations.

Dr. [redacted] notes the petitioner's ten years of clinical obstetrics and gynecology experience in Iran. As noted in *Matter of New York Dep't of Transp.*, 22 I&N Dec. at 222, the regulations indicate that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. The decision then reasons that because exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the waiver sought in this matter. *Id.*

Dr. [redacted] asserts that the petitioner is essential to the laboratory and that without the petitioner's familiarity with the clinical aspects of PCOS and the advanced techniques developed for the research as well as her expert knowledge of the physiology and pathophysiology of the ovary, the investigation "will be halted and the project will simply not progress." In a situation like the one before us, where the petitioner is a former clinician and has come to the United States to begin research, we will not speculate as to the petitioner's ability to contribute as a researcher. Rather, the nonimmigrant visa period allows the petitioner years to demonstrate her abilities as a researcher through publication. As stated above, as of the date of filing, the

petitioner's work had not yet been disseminated in a peer-reviewed journal or presented at a national conference.

Dr. [redacted] Director of the Center for Research in Reproductive Biology at Yale University, asserts that he has collaborated with the petitioner. He reiterates the prestige of being hired by Yale University, the importance of the petitioner's project, and concludes:

> [The petitioner] is the only member of this research team who can (i) conduct the microsurgical procedures required to obtained [sic] the necessary ovarian theca cells; (ii) study the effects of antioxidants on apoptosis (programmed cell death); and (iii) examine the proliferation of the ovarian theca cells.

Dr. [redacted] formerly the Director of the Residency Training Program in Obstetrics at Yale University, asserts that the petitioner also collaborated with his research on using prenatal ultrasound to detect fetal Down Syndrome, the assessment of blood flow to fetal organs and the development of ultrasound markers for the prediction and detection of congenital heart defects in the fetus. The petitioner's coauthored article on this subject was in press at the time of filing.

Dr. [redacted] Chief of the Vincent Obstetrics and Gynecology Service at Massachusetts General Hospital, asserts that the petitioner is a "world authority" on PCOS cells and "has had to develop novel protocols in order to conduct this advanced research." Dr. [redacted] reiterates the claims made above, but does not explain how he became aware of the petitioner's work or assert that he himself has been influenced by it.

Dr. [redacted] a permanent member of the Iranian Academy of Medical Sciences, indicates that he and the petitioner worked on separate projects at an Iranian hospital but that he was sufficiently aware of her work to support her move to begin research at Yale University.

Dr. [redacted] a professor of obstetrics and gynecology at Tehran University, affirms the petitioner's talent as a physician in Iran, including receipt of Iran's "Best Physician" award. Dr. [redacted] asserts that the petitioner was chosen for her research position at Yale based on her extended clinical and experimental experience related to PCOS, but does not identify any specific research contributions.

The petitioner submitted Dr. [redacted] grant proposal, but our review of the proposal revealed no reference to the petitioner.

On appeal, the petitioner submitted new letters from Dr. [redacted] and Dr. [redacted] as well as several letters from independent experts in the field. These letters mostly highlight the petitioner's accomplishments published after the date of filing. For example, Dr. [redacted] Editor for the Society of Reproductive Endocrinology and Infertility, discusses the significance of a best paper award issued to the petitioner by the society in 2003, after the date of filing. Other references note presentations and publications that postdate the petition. Evidence of these recent presentations and articles is included in the record. As stated above, however, the petitioner must establish her eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak;* 14 I&N Dec. at 49. Thus, she must demonstrate that, as of that date, she already had a track record of success with some degree of influence on the field as a whole. It can be expected that to have

influenced the field, the petitioner must have already published work in peer reviewed journals disseminated to the field or at least have presented her work at a national conference.

The petitioner also submitted evidence that her collaboration with Dr. [redacted] on developing a sonogram test for Down Syndrome, published after the date of filing, has been cited a single time. A single citation is not significant and, for an article published after the date of filing, does not relate to the petitioner's eligibility as of that date.

In his new letter, Dr. [redacted] discusses his own credentials and the prestige of the laboratory he heads. We will not infer the petitioner's own influence from her colleagues or the laboratory in which she works. He professes shock that the director denied the petition without inquiring as to the petitioner's accomplishments after the date of filing. As explained above, any such accomplishments are not relevant to the adjudication of the instant petition. Dr. [redacted] further asserts that the petitioner is a "key investigator" of an NIH grant. As stated above, we were unable to discover any reference to the petitioner in the grant proposal submitted initially. Dr. [redacted] then asserts that the director did not have "any grounds to discount the integrity or authority of individuals who have written letters on [the petitioner's] behalf." We do not question the credibility of the petitioner's initial references. That said, letters from one's own immediate circle of colleagues, while important in providing details of the petitioner's role in various research projects, are not evidence of the petitioner's influence beyond that circle of colleagues.

In response to the director's concern regarding the lack of publication and citations as of the date of filing, Dr. [redacted] notes that the petitioner presented her work on oxidative stress in theca cells and that other work had been "accepted for a presentation" at a conference. As stated above, the only presentation the petitioner had made prior to the date of filing was at the home of her supervisor. The record does not reflect that this was a national conference. While the petitioner's work had been accepted as a poster presentation, the presentation occurred after the date of filing. Moreover, as stated above, the record does not establish that a poster presentation is as prestigious as an oral presentation.

Dr. [redacted] discusses work published and presented in 2003 and 2004, over a year after the date of filing. This work had not been disseminated in the field prior to the date of filing and cannot be said to have influenced the field as of that date.

In a new letter, Dr. [redacted] acknowledges the lack of citations but notes that the petitioner's work "was only recently published" and that, thus, "it may take several more months or even years before other laboratories develop comparable techniques and produce findings related to ours." Dr. [redacted] further states that his laboratory is "the only laboratory in the world that is actively working on the effects of oxidative stress and statins on theca-interstitial cells." Other references, however, assert that the petitioner's work has implications for other fields of medicine, including cardiology and endocrinology. Not all citations are by researchers performing the same research. In fact, such an article would not be original and would be unlikely to be published. Moreover, medical and biology journals often include review articles on recent breakthroughs in the field and commentaries, which serve as excellent objective evidence of a study's significance in the field. The general media also covers truly significant work. The record contains no evidence of any review articles, commentaries or articles in the general media citing the petitioner's work. The Internet materials on PCOS provided on appeal, including one by Dr. [redacted] make no mention of the work on oxidative stress ongoing at Yale University and do not suggest antioxidants as a potential modulator

of the disease. Regardless, as discussed above, the petitioner's work had not even been published as of the date of filing.

The record shows that the petitioner is respected by her colleagues. The petitioner has not established, however, that as of the date of filing, her research had already influenced the field.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.